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No. 56419-0-II

COURT OF APPEALS, DIVISION TWO OF THE STATE OF
WASHINGTON

PATRICIA LANDES,

Respondent,

v.

PATRICK CUZDEY,

Appellant.

BRIEF OF RESPONDENT

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1. INTRODUCTION

No good deed goes unpunished. Landes, an elderly widow on a fixed income, made the mistake of allowing her daughter's husband to live on her real property. He was a tenant-at-will. When Landes's daughter left Cuzdey, Cuzdey sued Landes in a separate quiet title action attempting to take his ex-mother-in-law's property. He alleged an oral agreement for the sale of the land with Landes's husband who had been dead for a decade. The trial court found his claims frivolous. Division 1 affirmed summary judgment ruling that Cuzdey had no interest in Landes's real property and that she owed him no money nor damages for any alleged work on the property.

Cuzdey has been given every opportunity to amicably leave Landes's real property. He has refused. He has dragged out eviction hearings for years, while insanely believing that somehow he will still take her property. If he cannot have her property, his sole goal is causing as much monetary and

emotional harm to his elderly ex-mother-in-law as he can. That is what this appeal of this unlawful detainer matter is about.

On remand from this Court, this case went to jury trial on the sole issue of “whether Cuzdey performed on Landes’s unilateral contract offer by paying the offered rent amounts while stating that he did not admit to being a tenant and was paying under protest.” During which Cuzdey agreed to, and did not object to, dispositive jury instructions, such as that an offeree to a unilateral contract cannot make a counteroffer—the exact issue previously at issue on appeal but not decided—making irrelevant Cuzdey’s letter to Landes that previously created a material issue of fact. Regardless, the jury found in favor of Landes and the trial court rightfully issued double damages and attorney fees and costs pursuant to law and contract against Cuzdey.

Furthermore, Cuzdey has waived several arguments presented below by not raising them here. He also cannot pursue new arguments presented for the first time on appeal that he attempts to in his Brief of Appellant.

Nevertheless, all of his arguments on appeal fail on the merits, and this Court has every reason, both in law and equity, to affirm the well-experienced and learned trial court judge. Doing so helps end this nonsensical and insane decade long nightmare, vexatious litigation, and torture for an elderly widow on a fixed income who just wants to live out the rest of her limited days in peace—without fear and stress—and with enough money to survive.¹

2. RESTATEMENT OF THE ISSUES

2.1. Whether Cuzdey waived on appeal arguments regarding trial setting and the four issues presented for jury trial? Yes.

2.2. Whether Cuzdey waived on appeal arguments before the trial court for reducing the jury's verdict against him? Yes.

2.3. Whether Cuzdey's arguments for the first time on appeal, not presented to the trial court, regarding double damages and attorney fees should be considered on appeal? No.

2.4. Whether the agreed, never objected to, Jury

¹ Cuzdey has (frivolously) sued Landes personally as well as Thurston County Sheriff's Office in ancillary matters under difference cause numbers. Cuzdey presents essentially the same arguments in those cases as he did in this matter.

Instruction No. 8 dispositively resolved the legal question previously discussed on appeal in favor of Landes? Yes.

2.5. Whether Cuzdey waived any argument on appeal regarding the agreed and lawful and proper, never objected to, Jury Instruction No. 5? Yes.

2.6. Whether the trial court abused its discretion balancing the admission and exclusion of evidence at trial for the jury's consideration? No.

2.7. Whether the trial court abused its discretion awarding double damages under Chapter 59.12, RCW, and attorney fees and costs to Landes. No.

2.8. Whether Landes should be awarded attorney fees and costs on appeal? Yes.

3. RESTATEMENT OF THE CASE

3.1. In 2014, Cuzdey previously sued Landes in a separate quiet title action, under theories of breach of contract and/or adverse possession, claiming he owned the real property at issue in this unlawful detainer. (CP 138-49). The alleged basis for his ownership, he claimed, was an oral agreement for the sale of Landes's real property made between Benny J. Landes (who had been dead for a decade before this claim was ever made by Cuzdey) and Cuzdey dating back to the 1980's. (CP 138-204).

In the same suit, he sued Landes for money damages both in law and equity, under theories of breach of contract, conversion, quantum merit, constructive trust, and/or unjust enrichment. (CP 138-49). One claim was that he was owed money for alleged work on Landes's real property (while he lived on her real property in the 1980's, married to Landes' daughter, for free as a tenant-at-will). (CP 138-204).

3.2. The trial court found all of these claims in that quiet title action frivolous. Division One affirmed the trial court's decision that Cuzdey had zero ownership interest in Landes's real property. (CP 185-190). It also affirmed that Cuzdey had no claim to money or damages, in law or equity, from Landes for any past due work allegedly done on her real property. (CP 185-190). The only issue of fact remaining, held Division One, was ownership of the Nova Mobile home. (CP 185-190).

3.3. Subsequent to the quiet title action, in 2016, Landes filed this unlawful detainer. (CP 3-33). Landes argued that Cuzdey was a holdover tenant-at-will with no right to be on her

real property. (CP 34-40). Further he changed that status, entering into a month-to-month tenancy, by performing on a unilateral contract offer and promise, titled a “Notice to Begin Rental”, in January of 2016. (CP 34-40). Cuzdey did so by remaining on her property on and after January 1, 2016, when he had zero right to be there, and/or paying by rent not once but twice in January and February of 2016. (CP 34-40) (trial court finding “Cuzdey was represented by counsel. . . . and . . . Cuzdey understood paying rent in January of 2016 would cause [him] to enter into a contract. . . .”).

3.4. Cuzdey expressly conceded to the trial court that his possession prior to any unilateral contract offer or promise from Landes was characterized as a “30-plus year tenancy-at-will”, *i.e.*, someone with zero legal right to be on the property after being requested vacate and given time to do so:

12	COMMISSIONER ZINN: Good morning.
13	MS. STRICKLER: Mary Ann Strickler here. As
14	you've mentioned and as my brief has stated, our
15	argument is that there's no subject matter jurisdiction
16	here. Is there a tenancy? Yes, there's been a 30-plus
17	year tenancy at will, and ejectment is the proper forum
18	for evicting a tenant at will. It is not the unlawful
19	detainer statute.

(CP 206-217). The trial court agreed with Landes that he was a tenant-at-will that became a month-to-month tenant pursuant to the unilateral contract. (CP 34-40). It entered an order for a writ of restitution. (CP 34-40). Cuzdey continued to argue he was a tenant-at-will, and never became a month-to-month tenant by paying rent, in this case's first appeal. (CP 221-270).

3.5. In 2019, this Court found and held:

- Prior to 2016, there is no question that Cuzdey's occupancy on Landes's property. . . . is referred to as a 'tenancy at will'. . . .
- At the time Landes sent Cuzdey the Notice to Begin Rental, he was a tenant at will.
- [A] tenancy at will is a tenancy 'of indefinite duration, terminable at the will of either landlord or tenant, without advance notice'. . . .
- We conclude that the evidence creates a genuine issue of fact regarding mutual assent – whether

Cuzdey performed on Landes's unilateral contract offer by paying the offered rent amounts while stating that he did not admit to being a tenant and was paying under protest. Therefore, a jury trial is required on this issue under RCW 59.12.130.

- We hold that questions of fact regarding the formation of a rental agreement precluded entry of an unlawful detainer judgment and required a trial by jury under RCW 59.12.130.
- Substantial performance renders a unilateral contract binding and enforceable.
- [T]he offeree cannot create a new contract with the offeror by changing the terms of the offer and then performing those new terms.
- In January of 2016, Cuzdey had not posted a bond to stay execution of the court's ruling. Therefore, Landes had the legal right to evict Cuzdey if he did not accept the offer of a tenancy. It could be inferred from these circumstances that Cuzdey intended to perform on the unilateral contract offer by remaining on the property.
- Landes is correct that, despite the statements in Cuzdey's letter to the contrary, Cuzdey was under no court order to pay rent to Landes. At the time Landes sent Cuzdey the Notice to Begin Rental, he was a tenant at will on her property who had not attained any stay of the enforcement of the judgment in the quiet title action. In December 2015, the trial court ordered that the judgment against Cuzdey would be stayed on the condition

that he posted a \$75,000 supersedeas bond on or before January 11, 2016.

- The facts of this case are challenging because Cuzdey did not simply perform on Landes's offer without any limitations. And he did not communicate a counteroffer to Landes before performing on her offer. He did both – he performed by paying rent and he communicated a counteroffer. Arguably, this constituted the type of conduct – Cuzdey attempting to make “what would amount to a new offer” to himself from Landes – that the court in *Higgins* stated was not allowed. 28 Wn.2d at 318.

3.6. After remand, in June of 2021, Landes amended her complaint (CP 68-104) and the trial court entered a trial setting order. (CP 115-17). Based on Landes’s amended complaint and this Court’s decision on appeal, the trial court defined the *only issues for trial* as whether Cuzdey was a trespasser, whether there was a rental agreement, whether this was a proper unlawful detainer action or whether it should be converted to ejectment, and whether the matter should be analyzed under Chapter 59.18, RCW, or Chapter 59.12, RCW. (CP 115-17).

3.7. In July of 2021, Landes filed a motion in limine, in which requested the following based on the prior court of appeal

decisions and under various doctrines of law:

- Exclusion of certain of Cuzdey's ER 904 exhibits at trial.
- Prohibiting Cuzdey from arguing or testifying that he had any ownership or possessory interests in Landes's real property prior to January of 2016 other than that of a tenant-at-will as the quiet title decision on appeal and 2019 decision from this Court ruled otherwise.
- Prohibiting any testimony or transaction testimony related to Benny J. Landes barred under the Deadman's Statute, RCW 5.60.030.
- Prohibiting testimony or evidence from Cuzdey that he was entitled to any compensation for any alleged work on Landes' real property as the quiet title decision on appeal ruled otherwise.
- Prohibiting testimony or evidence from Cuzdey that he was under any court order to pay supersedeas bond in January or February of 2016 as this Court expressly ruled the opposite in the prior appeal.
- Prohibiting evidence and testimony not material to the four issues between the parties to be presented at trial.

(CP 125-307). Cuzdey argued in response:

- He should be able to bring unjust enrichment claims in the unlawful detainer action.

- He had a claim to title and property interest in Landes's real property and that he should be able to present testimony and evidence establishing this claim in the unlawful detainer action.
- He was entitled to damages and compensation for alleged historically done work on Landes's real property and he should be able to present testimony and evidence establishing this claim in the unlawful detainer action.
- Ejectment was the proper action, not unlawful detainer.
- His ER 904 exhibits were admissible to show he historically made valuable improvements to Landes's real property.
- "Whether or not Mr. Cuzdey is or was a tenant at will is not relevant to this trial, as it is not relevant to whether a rental agreement was formed that converted Mr. Cuzdey's prior status . . . into a month-to-month tenant. . . ."
- He should be able to testify that his checks from January and February of 2016, labeled "rent", were payments made under court order for supersedeas bond.

(CP 324-28, 424-425). Landes also pointed out that, after remand, another trial court judge affirmed in the quiet title action that Cuzdey's claims for alleged money damages or alleged work

on the property were dismissed with prejudice by Division 1.
(*e.g.*, RP July 23, 2021, at 56).

3.8. As to the motion in limine, the trial court orally ruled:

- This is not a trial to address all of the potential financial claims between the parties. It is to determine whether there was a rental agreement and whether accepting that agreement is what occurred. That's the essence of this trial.
- So the court is limiting testimony prior to the unilateral contract that was offered by Ms. Landes to Mr. Cuzdey and issues regarding financial claims, and that includes the evidence of work done in order to justify financial claims. I believe that based upon the court's limitation of evidence the issue of testimony related to the late Benny J. Landes goes away because it's simply not relevant, and because it's not relevant, the court doesn't need to get to the Dead Man's Statute, but if it does, the court is excluding that testimony in any event.
- The court is also excluding the consideration of the documents for the purpose of showing financial claims and work done and entitlement to a financial award. Again, that's not what this trial is about.

(RP July 23, 2021, at 56-61).

3.9. In August of 2021, the trial court entered a written order:

- This is an expedited special statutory proceeding, an unlawful detainer action, and by law the issues for the court to decide are limited.
- Evidence at trial shall be limited to the four issues for trial: whether Cuzdey was a trespasser, whether there was a rental agreement, whether this was a proper unlawful detainer action or should be converted to ejectment, and whether the matter should be analyzed under Chapter 59.18, RCW, or Chapter 59.12, RCW
- Ownership or alleged ownership of real property is not at issue.
- Alleged work done on the real property is not at issue.
- Claims for unjust enrichment are not at issue.
- Conversations or transactions with the late Benny J. Landes are barred by the Deadman's Statute and not relevant to the issues at trial.
- Rightful possession of the real property and determining whether the parties entered into a rental agreement are the primary issues to be tried.
- Cuzdey's ER 904 exhibits numbers 502 to 505 are excluded if offered to establish financial claims or work alleged done on the property and when not directly related to the four issues presented for trial.
- Evidence or testimony regarding the Nova mobile home is not an issue for this trial.

3.10. At trial, Cuzdey's letter to Landes accompanying the rent checks was admitted into evidence. (Ex. 501). He testified to the contents of the letter and as to his mistaken beliefs and perceptions that he was under a court order when he paid rent to Landes and as to his possession on Landes' real property. (RP August 9, 2021, at 202-11; RP August 10, 2021, at 215-46). He discussed when he first came onto the property and testified as to his intent when performing on Landes's unilateral contract offer and promise. (*e.g.*, RP August 9, 2021, at 179-91). When Cuzdey made comments about owning the real property, or attempted to discuss long previous work done on the property, however, the Court excluded such testimony. (*e.g.*, RP August 9, 2021, at 179-91). Such testimony was barred by Deadman's Statute, the order on limine, relevance, and by the fact that it would be overly-prejudicial, confusing, and not helpful to the jury as to the limited issues for it to resolve. (*e.g.*, RP August 9, 2021, at 179-91).

3.11. Cuzdey was asked on the stand what the terms of

his “counteroffer” to Landes where, as stated in the letter to her accompanying his rent checks. (RP August 11, 2021, at 244). Cuzdey answered that the contractual “terms” he was offering to Landes was that he “was paying under perceived court order” and “under protest” and that he “in no way admit of being a tenant to Mrs. Landes.” (RP August 11, 2021, at 244).

3.12. Jury Instruction No. 5 provided the following:

The Plaintiff has the burden of proving each of the following propositions to prove a unilateral contract existed between the Plaintiff and the Defendant:

- (1) That Plaintiff made a unilateral contract offer or promise to Defendant; and
- (2) That Defendant substantially performed on the terms of the Plaintiff’s unilateral contract promise by (a) non-exclusively occupying or using Plaintiff’s real property on or after January 1, 2016, or (b) by paying rent as ordered by Plaintiff on or after January 1, 2016; and
- (3) That there was mutual assent, meaning Plaintiff and Defendant’s reasonable actions and words at the time of the unilateral contract promise demonstrated intent to substantially perform on the terms of the Plaintiff’s unilateral contract promise. In determining intent to substantially perform on Plaintiff’s unilateral contract promise, you must look at the plain language of the unilateral contract promise and consider the parties’

reasonable words and actions, disregarding the parties' unexpressed personal feelings, prejudices, interpretation, or mental perceptions; and

(4) That there was consideration. Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange. If you find that Defendant performed on the unilateral contract promise by occupying or using Plaintiff's real property on and past January 1, 2016, or that Defendant paid rent to Plaintiff pursuant to the unilateral contract promise, or that any other act, benefit gained, or forbearance by Defendant constituted performance on the unilateral contract promise, then there was consideration.

If you find from your consideration of all the evidence that each of these propositions has been proved, your answer to Question #1 on the Special Verdict Form must be "Yes." On the other hand, if you find from your consideration of all of the evidence that each of these propositions has not been proved, your answer to Question #1 on the Special Verdict Form must be "No".

(CP 456-57).

3.13. Jury Instruction No. 5 was agreed and never objected to by Cuzdey. (RP AUGUST 11-12 at 283-84) (stating "we largely agreed to the jury instructions"); (RP AUGUST 11-12 at 289) (stating "The Instruction No. 5 is I believe an agreed instruction. I have taken out the case cite which I think is

appropriate when instructing.”); (RP AUGUST 11-12 at 292 (stating “THE COURT: Is there anything else we need to address on the record before we take a break? MR. DOBBINS: No, Your Honor.”); (RP AUGUST 11-12 at 375-76) (stating “THE COURT: Thank you. I appreciate that close look. Anything else, Mr. Dobbins? MR. DOBBINS: That was it, Your Honor.”); (RP August 11-12 at 296) (stating, “Have the parties reached agreement on any of the court’s proposed instructions? MR. MAZZEO: I think we have some agreement on those.”); (RP August 11-12 at 301) (stating, “THE COURT: Okay. Are there any other proposed changes or modifications to the court’s proposed set of instructions? MR. DOBBINS: Your Honor, on Instruction No. 10. . . .”); (RP August 11-12 at 369) (stating, “MR. MAZZEO: I agree. THE COURT: Mr. Dobbins. MR. DOBBINS: No objection.”); (RP August 11-12 at 377) (stating “THE COURT: Are there any other changes that should be made or are being proposed to the court’s final instructions at this time? MR. DOBBINS: Not from us, Your Honor. MR. MAZZEO: No,

Your Honor.”); (RP August 11-12 at 378-79) (stating, “THE COURT: Do you have any other exceptions or objections to the court's jury instructions? MR. MAZZEO: No, Your Honor. THE COURT: Thank you. Mr. Dobbins, do you have any objections or exceptions to the court's jury instructions? MR. DOBBINS: No, Your Honor.”)

3.14. Additionally, Jury Instruction No. 8 was also agreed, never objected to, and resolved the dispositive issue this Court discussed, but did not decide, previously on appeal regarding *Higgins*. It provided the following:

A party receiving a unilateral contract offer or promise may not make a counteroffer to the maker of the offer or promise. Rather, the recipient must either (1) accept the offer or promise by performance; (2) decline to perform; or (3) request a new offer or promise on different terms.

(CP 460).

3.15. Cuzdey raised no objection to the verdict form provided to the jury. (RP August 11, 2021, at 268, 297, 299-301, 306-07, 319, 323, 341-42, 344).

3.16. After deliberation, the jury reached its verdict in

favor of Landes. (CP 447-48). It found that Cuzdey “enter[ed] into a unilateral contract, on or after, January 1, 2016, for the use of [Landes’s] real property.” (CP 447-48). It found that Cuzdey breached the agreement and that he owed Landes \$97,000.00 in back owed rent. (CP 447-48).

3.17. The trial court entered an order for a writ of restitution. (CP 575-77).

3.18. Landes moved for attorney fees, costs, and a statutory judgment including double damages, based on the tenancy for land only falling under Chapter 59.12, RCW, and the attorney fees being appropriate as a contractual term incorporated into the unilateral contract from Chapter 59.18, RCW. (CP 466-73).

3.19. Cuzdey admitted the tenancy was for land only (*e.g.*, CP 560-61), under Chapter 59.12, RCW, but objected to double damages and attorney fees being entered on the grounds that the “the trial that just completed necessarily did not include the mobile home dwelling and so rental of any dwelling unit

cannot be the basis of any verdict or award. . . .” (CP 560-62). Landes, for her part, never argued the Nova mobile home had anything to do with this matter.

3.20. Cuzdey moved to reduce the amount of the verdict and judgment to be entered against him. (CP 552-58). He argued that the jury’s verdict was not supported by the evidence presented. (CP 552-58). Landes responded explaining the evidence did support the verdict and that the verdict form was never objected to by Cuzdey. (CP 578-82). The rental was for Landes’s land only and the Nova mobile home was irrelevant. (CP 578-82).

3.21. The Court denied the Cuzdey’s motion to reduce and Cuzdey appealed. (CP 578-82; 586-87; 588-596).

3.22. The trial court took supplemental briefing on the issue of double damages and attorney fees and costs. Landes’ arguments remained the same. (CP 597-604). Cuzdey’s arguments remained the same except that “to the extent rents are doubled, it should not include any period for which Cuzdey was

not actually on the property. . . .” (CP 619-22). Landes’s argument addressing Cuzdey’s additional argument was that unilateral contract was for the non-exclusive rental occupancy and use of the land regardless of Cuzdey not being present for a period of months. (CP 597-622). Cuzdey, unquestionably and at an extraordinarily inexpensive rental rate, used and occupied Landes’ land with a massive amount of personal belongings the entire time regardless of when he was or was not present. (CP 597-622).

3.23. Cuzdey did not make the arguments to the trial court that he makes on appeal in regard to double damages or attorney fees being awarded to Landes, *e.g.*, that “Landes may not, after the fact, pick and choose which provisions of the RLTA to incorporate” and “The only reason an attorney fee provision in a contract is enforceable is because both parties promise to abide by it and pay the fees to the prevailing party” and RCW 59.18.410(1) is “inconsistent” with RCW 59.12.170. (*Compare* CP 552-58, 619-22 *with* Brief of Appellant at 59-60).

3.24. In February of 2022, the trial court awarded double damages and attorney fees and costs in favor of Landes. (CP 729-31). It entered a principal judgment against Cuzdey in the amount of \$204,000.00, attorney fees in the amount of \$30,552.75, and costs in the amount \$352.44. (CP 729-31).

4. RESPONSIVE ARGUMENT

4.1. Cuzdey's Previous Arguments Below to Present More Issues at Trial than Ordered by the Trial Court in the Trial Setting Order are Waived on Appeal.

“It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.” RAP 10.3(a)(4); RAP 10.3(a)(6); *Emmerson v. Weilep*, 126 Wash. App. 930, 939-40, 110 P.3d 214, 218 (2005); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash. 2d 801, 809, 828 P.2d 549, 553 (1992); *Sacco v. Sacco*, 114 Wash. 2d 1, 5, 784 P.2d 1266, 1268 (1990); *Smith v. King*, 106 Wash. 2d 443, 451, 722 P.2d 796, 801 (1986); *Puget Sound Plywood, Inc. v. Mester*, 86 Wash. 2d 135, 142, 542 P.2d

756, 761 (1975).

In *Bosley*, *Smith*, and *Mester*, the Supreme Court held, en banc, that the plaintiffs' assignments of error were waived or abandoned because they did not present adequate argument or cite case law. *Bosley*, 118 Wash. 2d at 809; *Smith*, 106 Wash. 2d at 451; *Mester*, 86 Wash. 2d at 142.

Here, Cuzdey raises no argument on appeal regarding the trial court's June 25, 2021, trial setting order. (CP 115-17). This order limited the trial issues to four categories, mainly being whether Cuzdey performed on the unilateral contract and promise from Landes. (CP 115-17). None of the categories included any historical ancillary issues such as Cuzdey's claim of ownership on the property or claims for compensation, *e.g.*, unjust enrichment, for historical work done on the property.

Accordingly, all such arguments by Cuzdey for a more expansive trial are waived on appeal. Making them in a reply brief is too late.

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4.2. Cuzdey's Arguments for Reducing the Jury Award Presented in His Motion to Reduce Verdict are Waived on Appeal.

Failure to assign error to or provide argument and citation to authority as required under RAP 10.3, precludes appellate consideration. RAP 10.3(a)(4); RAP 10.3(a)(6); *Emmerson*, 126 Wash. App. at 939-40; *Bosley*, 118 Wash. 2d at 809; *Sacco*, 114 Wash. 2d at 5; *Smith*, 106 Wash. 2d at 451; *Mester*, 86 Wash. 2d at 142.

Here, Cuzdey raised no objection to the verdict form provided to the jury. (CP 447-48; RP August 11, 2021, at 268, 297, 299-301, 306-07, 319, 323, 341-42, 344). On appeal he abandons his arguments before the trial court by making no argument to reduce the jury verdict as he did below. Doing so in a reply brief is too late. Thus, arguments that there was not sufficient evidence to support the jury verdict are waived and/or abandoned on appeal and this Court has no reason to consider them.

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4.3. Cuzdey’s Arguments for the First Time on Appeal, Not Presented to the Trial Court, Regarding Double Damages and Attorney Fees Should Not Be Considered.

Parties must preserve arguments before the trial court to raise them on appeal. *Frantom v. State*, 12 Wn. App. 2d 953, 965, 460 P.3d 1100, 1106 (2020) (holding “A party cannot raise on appeal an issue it did not raise at the trial court level, unless the issue concerns a manifest constitutional error.”) (citing RAP 2.5(a); *Aventis Pharm., Inc. v. State*, 5 Wash. App. 2d 637, 650, 428 P.3d 389 (2018)). No authority in Washington State exists for reversing a trial court on alternative, non-constitutional, grounds not argued to the trial court nor considered by it. *E.g.*, *State v. Sondergaard*, 86 Wn. App. 656, 657–58, 938 P.2d 351, 352 (1997), *review denied*, 133 Wash.2d 1030, 950 P.2d 477 (1998) (holding argument on appeal not justified where party did not present such argument to trial court for consideration); *see also State v. Hudson*, 79 Wash.App. 193, 194 n. 1, 900 P.2d 1130 (1995) (holding court of appeals can affirm decision

of trial court on an alternate theory which was argued to trial court) (citing *Tropiano v. City of Tacoma*, 105 Wash.2d 873, 876, 718 P.2d 801 (1986), *aff'd*, 130 Wash.2d 48, 921 P.2d 538 (1996)).

Here, in regard to the trial court's order on double damages and attorney fees in favor of Landes, Cuzdey for the first time, on appeal, argues "Landes may not, after the fact, pick and choose which provisions of the RLTA to incorporate" into the unilateral contract, "The only reason an attorney fee provision in a contract is enforceable is because both parties promise to abide by it and pay the fees to the prevailing party", and RCW 59.18.410(1) is "inconsistent" with RCW 59.12.170. (*Compare* CP 552-58, 619-22 *with* Brief of Appellant at 59-60). Such arguments were not raised or made to the trial court, are not of constitutional magnitude, and this Court had no reason to consider them. *See e.g., Frantom*, 12 Wn. App. 2d at 965; *Sondergaard*, 86 Wn. App. At 657–58.

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4.4. Agreed, and Never Objected to, Jury Instruction No. 8 Dispositively Resolved the Legal Question Previously on Appeal in Favor of Landes.

A unilateral contract becomes executed once the offeree substantially performs. *Storti v. Univ. of Wash.*, 181 Wn.2d 28, 36, 330 P.3d 159 (2014). An offeree cannot “create what would amount to a new offer . . . nor alter the only [offer the offeror] had ever made. . . .” *Higgins v. Egbert*, 28 Wn.2d 313, 318, 182 P.2d 58, 61 (1947). In other words, when an offeree receives a unilateral contract offer, he or she cannot make a counteroffer. *Id.* That is precisely what makes a unilateral contract—*unilateral*—and *not bilateral*; there are no exchange of promises, there is promise for substantial performance. *See id.*

Accordingly, the offeree has three options (not including a counteroffer) once in receipt of a unilateral contract offer or promise: (1) “ma[k]e an effort to perform the terms of the offer”, (2) “endeavore[] to persuade [the offeror to change the terms of the offer]”, or (3) “decline[] to do anything further”, and not perform on the unilateral contract offer. *Id.*

Here, the dispositive legal question not resolved in the previous appeal was whether Cuzdey could make a counteroffer or not. This Court did not answer that question. Instead, it stated that “the facts were challenging” because Cuzdey “did not communicate a counteroffer to Landes before performing on her offer. . . . He did both – he performed by paying rent and he communicated a counteroffer.” *Landes v. Cuzdey*, 10 Wn. App. 2d 1002 (2019). This Court then went on to infer that *Higgins* prohibited counteroffers. *Id.* (holding “Arguably . . . Cuzdey attempting to make ‘what would amount to a new offer’ to himself from Landes – . . . the court in *Higgins* stated was not allowed.”).

No such legal question or quandary exists in this appeal. Cuzdey agreed, conceded, and did not object to Jury Instruction No. 8 that an offeree only has three options upon receipt of unilateral contract offer—none of which include making a counteroffer.

A party receiving a unilateral contract offer or

promise may not make a counteroffer to the maker of the offer or promise. Rather, the recipient must either (1) accept the offer or promise by performance; (2) decline to perform; or (3) request a new offer or promise on different terms.

(*e.g.*, CP 460; RP August 11-12 at 378-79) (stating, “THE COURT: . . . Mr. Dobbins, do you have any objections or exceptions to the court’s jury instructions? MR. DOBBINS: No, Your Honor.”). By being agreed, and unobjected to, Jury Instruction No. 8 resolved this legal issue raised in the previous appeal: Cuzdey could not make a counteroffer on the unilateral contract offer and promise from Landes.

Accordingly, Cuzdey’s letter to Landes attempting to communicate a counteroffer to her is irrelevant in this appeal; Cuzdey could not as a matter of law in this case make a counteroffer.² Dispositively, since he did not request Landes

² Notably, the letter—before the jury as an exhibit—*clearly stated that Cuzdey was paying rent*, just under protest. Protest all he wants—Cuzdey clearly admitted in the letter that he was paying rent. That is substantial performance, and the jury was correct and justified in finding so.

propose a new offer on different terms, the only thing that matters in this appeal is whether the jury was justified in finding mutual assent based on Cuzdey's actions. His actions were indisputably to pay rent, not once but twice. Moreover, he remained on Landes's real property without any legal right to do so. Thus, Cuzdey substantially performed on Landes's unilateral contract offer, he gained the benefit of lawfully being on Landes's real property as a month-to-month tenant, there was mutual assent, and the contract was enforceable (as the jury found). *See Storti*, 181 Wn.2d at 36; *Higgins*, 28 Wn.2d at 318.

In sum, Jury Instruction No. 8—having been agreed and not objected to—resolves the main issue on appeal in favor of Landes. The parties agreed that, and there was no objection to the fact the jury was instructed that, Cuzdey could not make a counteroffer to Landes' unilateral contract offer and promise. The agreed and unobjected jury instruction, based on *Higgins*, further supplied Cuzdey three options upon receipt of Landes' unilateral contract offer and promise. Of those three options,

Cuzdey indisputably chose to perform on Landes's offer. Doing so gave him the benefit of being on Landes's real property lawfully, and created a month-to-month rental agreement and contract.

Cuzdey's letter to Landes about mistaken beliefs, protests, and amounting to an attempted counteroffer was made irrelevant. After Cuzdey breached the contract, he was indisputably provided proper notice, and subsequently properly evicted. This Court no reason to question the jury's well-reasoned findings and verdict.

4.5. Jury Instruction No. 5 was Agreed Language Between the Parties, was Never Objected to, and Contained No Defect. Cuzdey Waived, and/or Created, Any Claim of Instructional Error on Appeal by Not Objecting to, and Agreeing to, the Instruction Below.

"Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." *State v. Barnes*, 153 Wash.2d 378, 382, 103 P.3d 1219 (2005). A party who fails

to object to jury instructions below waives any claim of instructional error on appeal. *State v. Knight*, 176 Wn. App. 936, 950, 309 P.3d 776, 784 (2013); *see also Frantom*, 12 Wn. App. 2d at 965. Additionally, “[u]nder the invited error doctrine, a party may not set up an alleged error and then complain about the error on appeal.” *See In re Estate of Muller*, 197 Wn. App. 477, 484, 389 P.3d 604, 609 (2016).

Here, Cuzdey argues that Jury Instruction No. 5 was defective and that it “removed any discretion that the jury would have had to consider the nuanced questions that this Court posed in its prior Opinion.” (Brief of Appellant at 52-53). Further, he argues, the “Jury was not free to find” that neither Cuzdey paying Landes “rent” nor remaining on her real property constituted acceptance of Landes’s unilateral contract offer and promise. (Brief of Appellant at 52-53).

Dispositively, Jury Instruction No. 5 was agreed to and not objected to by Cuzdey at trial, which prohibits him from raising any error at all on appeal. Cuzdey has waived and/or invited any

argument regarding the instruction. This Court should not consider his arguments as to Jury Instruction No. 5 on appeal at all. *Knight*, 176 Wn. App. at 950; *see also Frantom*, 12 Wn. App. 2d at 965; *Muller*, 197 Wn. App. at 484.

Moreover, *arguendo*, Cuzdey's arguments are meritless. The exact question this Court remanded for the jury to decide was "*whether Cuzdey performed on Landes's unilateral contract offer by paying the offered rent amounts while stating that he did not admit to being a tenant and was paying under protest.*" Cuzdey testified at trial as to his subjective intent to pay rent under "protest." He testified disingenuously as to his alleged belief that he was paying not rent but pursuant to a court order that he very well knew by that order's plain language—and *this Court's written previous decision*—expired many months beforehand. He further testified he did not admit to being a tenant.³

³ In no reality was Cuzdey not a tenant, unless he was trespasser which he also denied. He was tenant-at-will for years at the

Fortunately, this disingenuous and not credible testimony by Cuzdey was within the purview of the jury to find credible or not credible. *Duc Tan v. Le*, 177 Wn.2d 649, 670, 300 P.3d 356, 367 (2013) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498, 104 S. Ct. 1949, 1958, (1984)); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 689 n. 35, 109 S. Ct. 2678, 2696 (1989) (holding appellate court should not disregard a jury's opportunity to observe live testimony and

graciousness of Landes who supported this adult man when he could not support himself (the idiom “no good deed goes unpunished” comes to mind). Cuzdey then became a holdover tenant when he refused to vacate upon Landes’ demand to do so. He then became a month-to-month tenant by performing on the unilateral contact offer and promise from Landes. Finally, he became a holdover tenant once again when he refused to vacate Landes’s property after she gave him lawful notice to do so under Chapter 59.12, RCW. Stated another way, a person saying people do not breath air or the sun does not warm the earth, or, in this case, Cuzdey disingenuously saying he was not a tenant and paying rent under protest and pursuant to a court order he knew was expired—*does not objectively make it so*. The jury properly found that he entered into a contract with Landes by substantial performance regardless of Cuzdey non-sensical statements otherwise. There is nothing improper about that; the jury simply found Cuzdey not credible—because he wasn’t.

assess witness credibility and deference to factual determinations that turn on credibility assessment is essential because of the fact finder's unique opportunity to observe and weigh witness testimony); *Newton v. Nat'l Broad. Co.*, 930 F.2d 662, 670–71 (9th Cir.1990).

Plainly stated, Cuzdey's testimony, and his made-up story as to why he was paying rent, did not fool the jury. It was obvious that Cuzdey would say anything to have his cake and eat it too. The able jury disregarded Cuzdey's not credible testimony and found that Cuzdey paying rent and/or remaining on Landes's property objectively constituted substantial performance and objectively constituted mutual assent. This was the very question on remand sent to the jury and the jury ably answered it. Cuzdey's not credible statements about his disingenuous subjective intent were not believed by the jury and Cuzdey has nothing to complain about on appeal.

Additionally, Cuzdey argues that the instruction directing the jury to "consider the parties' reasonable words and actions"

when considering the issue of mutual assent misstated the law. (Brief of Appellant at 53-55). He believes—for the first time on appeal—that the instruction should have directed the jury to “consider the reasonable meaning of the [parties’] words and acts.” (Brief of Appellant at 53-55).

This (waived instructional) argument is a red herring and falls entirely flat. First, the letter from Cuzdey is irrelevant given the parties agreed, and unobjected to, Jury Instruction No. 8. (*See* Section 4.4). Such instruction plainly—and correctly—provided that an offeree to a unilateral contract cannot make a counteroffer. (*See* Section 4.4). That is what makes a unilateral contract *unilateral*. Given that unappealable instruction, Cuzdey’s action in paying rent, not his counteroffer in his letter to Landes, was probative to the jury as to this issue of mutual assent (by performance).

Second, there is no substantive difference between the instruction given and that proposed by Cuzdey for the first time on appeal. The jury was not misled and was accurately informed

as to the law. The “reasonable meaning” of Cuzdey’s “words” in his letter, and testimony given at trial, was that he would say anything, including lie, to prevent his removal from Landes’ property:

[LANDES’S ATTORNEY:] Do you *currently believe* there was a court order?

[CUZDEY:] I know there’s a court order.

[LANDES’S ATTORNEY:] Let me finish the question. Do you *currently believe* there was a court order ordering you to pay rent?

[CUZDEY:] For the two months, yes. For sixty days.

[LANDES’S ATTORNEY:] *What two months?*

[CUZDEY:] *The two months that I paid.*

[LANDES’S ATTORNEY:] *Is that what you believe?*

[CUZDEY:] *I think I just answered that.*

(RP August 11, 2021, at 244-45) (emphasis added). Compare that not credible, and disingenuous, testimony to this Court’s previous decision—that Cuzdey undoubtedly read multiple

times—and that clearly stated: “Landes is correct that, despite the statements in Cuzdey’s letter to the contrary, Cuzdey was under no court order to pay rent to Landes.”

When someone lies once on the witness stand or says things that are objectively not credible—there is every reason to think he or she is not credible and/or lying as to everything he or she is testifying to. Clearly, Cuzdey’s answers here did not sit well with the jury, and rightfully so. The jury was specifically and correctly instructed, again not objected to, that there was no court order directing Cuzdey to pay rent in January or February of 2016. (CP 455) (Jury Instruction No. 4, stating “[Cuzdey] was not required to pay rent to [Landes] at the time she made a unilateral contract offer.”).

Regardless, and finally, “consider[ing] the reasonable meaning of [Cuzdey’s] words and acts” is six of one thing and half a dozen of another when comparing that standard to “consider[ing] the parties’ reasonable words and actions.” In both cases, the jury was free to determine whether Cuzdey’s

letter and his testimony demonstrated that he was not performing on Landes's unilateral contract offer and promise. The jury was free to make such fact finding and such credibility determinations. This Court has no reason to disregard the jury's findings.

4.6. The Trial Court Properly Granted Landes's Motion in Limine and Made Appropriate Evidentiary Rulings at Trial.

The proper function of a motion in limine is not to obtain a final ruling upon the admissibility of evidence; rather, it is designed "to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to a jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself." *Lagenour v. State*, 268 Ind. 441, 376 N.E.2d 475, 481 (1978).

Washington follows the objective manifestation theory of contracts. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503, 115 P.3d 262, 267 (2005). Under such theory, the

parties' "meeting of the minds" is determined not by mind reading, trying to determine, nor considering actual subjective intent. *Id.* The parties "objectively" demonstrated intent—from a bird's eye view so to speak—is what matters and is determined by looking at their outward actions. *Id.*

In the case of acceptance of a unilateral contract, acceptance is not made by reciprocal promises, or words to one another as in bilateral contract formation, but rather acceptance is completed when the offeree substantially performs on the unilateral offer and promise. *Higgins*, 28 Wn.2d at 318 (holding an offeree to a unilateral contract cannot "create what would amount to a new offer . . . nor alter the only [offer the offeror] had ever made. . ."). Counteroffers cannot be made to the offeror by an offeree in receipt of a unilateral contract offer and promise. *Id.* The sole inquiry into mutual assent is whether the offeree substantially performed on the unilateral contract offer and promise. *Id.*

Under the context rule, "surrounding circumstances and

other extrinsic evidence are to be used to determine the meaning of specific words and terms used [in the contract,] and not to show an intention independent of the instrument or to vary, contradict or modify the written word.” *Id.* (some internal punctuation omitted).

The doctrine of collateral estoppel bars re-litigation of an identical issue presented in a prior suit. *Garcia v. Wilson*, 63 Wn. App. 516, 518, 820 P.2d 964, 965 (1991). “The purpose of the doctrine of res judicata or claim preclusion is to avoid relitigation of a claim or cause of action.” *Deja Vu-Everett-Fed. Way, Inc. v. City Of Fed. Way*, 96 Wash. App. 255, 262, 979 P.2d 464, 467 (1999).

“One of the major purposes of [RCW 5.60.030] is to give protection to the writings and documents of a decedent or persons claiming thereunder, so that decedent’s purposes in making a conveyance in writing will not be defeated by parol description of his acts and purposes after his death.” *Hampton v. Gilleland*, 61 Wn.2d 537, 542–43, 379 P.2d 194, 197 (1963). The

Deadman's statute does so by "prevent[ing] interested parties from giving self-serving testimony about conversations or transactions with the decedent." *Erickson v. Robert F. Kerr, M.D., P.S., Inc.*, 125 Wn.2d 183, 189, 883 P.2d 313 (1994).

The test of a 'transaction' is whether the deceased, if living, could contradict the witness of his own knowledge." *Estate of Lennon*, 108 Wn. App. at 174-75; *see also Karl B. Tegland*, 5A Wash. Prac., Evidence Law and Practice § 601.20 (5th ed.) (stating "the pertinent question is whether the deceased could have contradicted the testimony; whether the deceased would have contradicted the testimony is immaterial.") (emphasis in the original). As to personal transactions, "[w]hen it appears that there was a personal transaction with the deceased and the testimony offered tends to show either what did or did not take place between the parties, it must be excluded so long as it concerns the transaction or justifies an inference as to what it really was." *See Estate of Lennon*, 108 Wn. App. at 175; *Martin v. Shaen*, 26 Wash. 2d 346, 352, 173 P.2d 968, 971 (1946)

(stating “[t]he statute may be as effectually violated by testimony of a negative character as by affirmative proof of what actually took place” and “[i]f the witness was not competent to prove what took place at that [personal] transaction by direct or affirmative testimony, he was not competent to prove it by indirect or negative testimony.”).

“To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality).” *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726, 729 (1987). “ER 403 controls the exclusion of relevant evidence.” *Id.* “ER 403 contemplates a balancing process.” *Id.* Highly probative evidence or evidence with minimal undesirable characteristics tips the balance toward admissibility. *Id.* On the other hand, evidence with pronounced undesirable characteristics or minimal probative value may be properly excluded. *Id.*

Here, this Court remanded on the issue of “whether Cuzdey performed on Landes’s unilateral contract offer by paying the offered rent amounts while stating that he did not admit to being a tenant and was paying under protest.” Cuzdey argues that the trial court “abused its discretion and failed to comply with this Court’s Opinion when it excluded all evidence of the context of the alleged contract formation.” By “all of the evidence” he specifically means “[t]he trial court unreasonably prevented the jury from hearing any historical context by excluding all evidence or testimony of ‘factual happenings that occurred prior to the unilateral contract/rental agreement offer or promise.’” (CP 408). He cites the context rule in support of his argument.

Cuzdey’s arguments are misplaced and without merit. First, the context rule limits admissible extrinsic evidence “to determine the meaning of specific words and terms used” *in the contract*. It is *not* a rule that allows any and all evidence of context surrounding the issue of mutual asset. Evidence that

“show[s] an intention independent of the instrument” or “var[ies]” or “contradict[s] or “modif[ies] the written word” is explicitly not admissible. *Hearst Commc'ns, Inc.*, 154 Wn.2d at 503.

Landes's unilateral contract and promise was plain in language: “On or after January 1, 2016, your non-exclusive possession and occupancy of the subject premises will be considered a month-to-month tenancy. . . .” and “[r]ent will be charged for your possession and occupancy of the subject premises, at the rate of \$1,500.00 per month . . . beginning January 1, 2016.” (CP 88). The context rule makes Cuzdey's letter to Landes irrelevant to the degree anything stated in it varies, contradicts, or modifies the words used in Landes's unilateral contract offer and promise. Cuzdey stating in an (irrelevant) “counteroffer”⁴ he was “paying rent” under “protest”, not admitting to being a tenant, or that he believed

⁴ What exactly the terms of this “counteroffer” were, is something that has never been explained.

there was an active court order, are all things that vary, contradict, or modify the words used in Landes's unilateral contract offer and promise.

Moreover, because Cuzdey cannot make a counteroffer to a unilateral contract offer and promises the letter and these statements are also irrelevant. The sole issue as to mutual assent in this case was whether Cuzdey's actions of paying rent and/or remaining on Landes's real property after January 1, 2016, constituted substantial performance. The only extrinsic evidence needed to provide "context" was whether rent was paid, *e.g.*, the rent checks (CP 91-92), and testimony that Cuzdey was still on Landes's real property on or after January 1, 2016, which was all allowed to come in at trial.

Cuzdey misreads the context rule as all expansive. It is not. The context rule itself *prohibited* extrinsic evidence or testimony regarding any actions prior to the unilateral contract offer and its acceptance because no such evidence was germane to "to determine the meaning of specific words and terms used" in

Landes's unilateral contract offer and promise. Cuzdey's letter to Landes was irrelevant because counteroffers are not permissible upon receipt of a unilateral contract offer or promise. (See Section 4.4) Additionally, both the letter to Landes and all "historical context" testimony or evidence were not relevant because it was all proffered by Cuzdey as an attempt to improperly "show an intention independent of the instrument" or to "vary" or "contradict" or "modify the written word[s]" in Landes's unilateral contract offer and promise.

Second, the previous decision from Division One soundly held that Cuzdey had no ownership interest in Landes' real property and Landes owed Cuzdey nothing for any alleged work done. Combined with the fact that this Court previously held Cuzdey was (holdover) tenant-at-will (with zero right to be on Landes's real property prior to January 1, 2016), the doctrines of collateral estoppel and res judicata prohibited Cuzdey from re-litigating those issues. The guise of arguing such evidence or testimony would provide "historical context" neither made the

evidence relevant nor admissible. The trial court was well within its discretion to prohibit testimony and evidence from Cuzdey that directly or indirectly could elicit a prejudicial emotional reaction from jurors or lead them to think he had some sort of ownership interest in Landes's real property or that Landes somehow owed Cuzdey money for work when she did not. Courts of appeal already dispositively decided these issues in Landes's favor.

Third, allowing Cuzdey to erroneously testify about ownership interests, or alluding to any legal right to be on Landes's real property, would not provide context for the jury—it would erroneously confuse, distract, and unfairly prejudice the jury regarding the specific issue on remand, “whether Cuzdey performed on Landes's unilateral contract offer by paying the offered rent amounts while stating that he did not admit to being a tenant and was paying under protest.”

The “historical context” that Cuzdey wanted to provide, *e.g.*, his blatantly erroneous belief that he owned Landes's

property and that he had done work on the property in the past, would have easily elicited an emotional response from the jury nothing to do with the issue of whether paying rent or remaining on the property after January 1, 2016, constituted mutual assent. (See RP August 9, 2021, at 171-211; RP August 11, 2021, at 215-246). Combined with the fact that all such claims for ownership and work on the property were previously, and forever, dismissed with prejudice, the trial court properly excluded such evidence.

On the other hand, Cuzdey was allowed to testify about his mistaken belief regarding paying rent under a previous expired court order. He letter to Landes accompanying his rent check was admitted. All of which was admitted into evidence for the jury's consideration. Therefore, Cuzdey has nothing complain about on appeal. The extremely experience and learned trial court judge properly balanced which evidence to allow and which evidence to exclude.

Fourth, Cuzdey was incapable of testifying at trial in a way

that did not violate the Deadman's statute and all such testimony regarding "historical context" was properly excluded on that basis. (RP August 9, 2021, at 171-211; RP August 11, 2021, at 215-246). Benny J. Landes owned the real property in past. Not Cuzdey. When Cuzdey attempted to testify as to *his* home or *his* property or *his* barn, or *work he supposedly did* to Benny J. Landes' property, the Deadman's Statute was invoked. Death sealed the lips of Benny J. Landes to refute such claims and the Deadman's Statute sealed Cuzdey's because Cuzdey's (erroneous) claim of ownership was based on an alleged many decades old oral agreement between Cuzdey Benny J. Landes. Benny J. Landes could have refuted any agreement, or allowing of Cuzdey, to do work on the property, or that Cuzdey did do any work, and the Deadman's statute barred testimony otherwise from Cuzdey. Not only was testimony regarding these transactions barred under the Deadman's Statute but Division One ruled years prior that the property was not Cuzdey's and that Cuzdey had no claim for work done on the property.

Finally, the very nature of unlawful detainer hearings is expedited. RCW 59.12.130; *see also* RCW 59.18.380. These trials are heard before other civil matters by statute because the issues are limited to that of rightful possession and those issues directly related such possession. All of the above reasons to exclude ancillary side trials and issues become stronger when viewed in the light of this expedited and narrow special statutory proceeding.

In sum, Cuzdey has nothing to complain about on appeal. The learned and well-experience trial court judge properly balanced the admission and exclusion of evidence at trial for the jury's consideration.

4.7. The Trial Court Appropriately Granted Landes Double Damages, Attorney Fees, and Costs.

Under *Parsons*, tenancies for the rental of real property only fall under Chapter 59.12, RCW. *Parsons v. Mierz*, 3 Wn. App. 2d 1015, 2018 WL 1733519 (2018) (unpublished). Chapter 59.12, RCW, provides for double rent and damages when a

tenant is evicted. RCW 59.12.170. Chapter 59.18, RCW, provides for attorney fees to a prevailing party. *E.g.*, RCW 59.18.290(3) (“Where the court has entered a judgment in favor of the landlord restoring possession of the property to the landlord, the court may award reasonable attorneys’ fees to the landlord.”).

Here, the trial court correctly determined, under *Parsons*, that Cuzdey’s tenancy was governed by Chapter 59.12, RCW. Therefore, Landes was entitled to double damages for back due rent. RCW 59.12.170. Landes’ unilateral contract, accepted by Cuzdey through performance, also incorporated by reference Chapter 59.18, RCW. The trial court, on this basis, properly awarded attorney fees to Landes.

Cuzdey argues otherwise. His arguments are raised for the first time on appeal and should not be considered. (*See* Section 4.3). Regardless, his arguments are without merit. He argues that because RCW 59.18.410(1) does not provide for double damages, Cuzdey did not “promise” to pay attorney fees, and that

because in *Parsons* no attorney fees were allowed, the trial court erred in awarding double damages and attorney fees in favor of Landes.

Cuzdey's arguments miss the mark. His tenancy was governed by Chapter 59.12, RCW, because it was for the rental of real property only. *Parsons*, 3 Wn. App. 2d 1015. Double damages were properly awarded by statute. RCW 59.12.170. That is simply the law, not an inconsistency with Chapter 59.18, RCW, and not "picking and choosing" provisions. Moreover, unlike the facts of *Parsons*, the rental agreement between Landes and Cuzdey incorporated by reference Chapter 59.18, RCW, which included the attorney fee provision in RCW 59.18.290(3). Under which, the trial court properly awarded fees to Landes.

RCW 59.18.410(1) provides for attorney's fees and damages, as does RCW 59.18.290 (*Faciszewski v. Brown*, 192 Wn. App. 441, 455, 367 P.3d 1085, 1091, *rev'd on other grounds*, 187 Wn.2d 308, 386 P.3d 711 (2016)) ("The judgment for unpaid rent payment placed the Landlords in the position they would

have been in had the Tenants not unlawfully detained the rental property.”). RCW 59.12.170 is merely another statute that doubles the amount of back due rent as damages collectible to the landlord. That’s not inconsistency, it is a statutory doubling of damages for tenancies having to do with land only, which is inarguably the case here; both statutes provide for damages, one just doubles the amount recoverable and other does not expressly prohibit that. Cuzdey cannot add words, or prohibitions, to statutes not written there.

Finally, unilateral contracts do not involve promises for promises. Cuzdey accepted the whole of the unilateral contract, including the incorporation of attorney fee provisions (RCW 59.18.290(3)) in Chapter 59.18, RCW, when he substantially performed by paying rent and/or remaining on her real property. No reciprocal promise regarding attorney fees was needed nor do they exist when accepting a unilateral contract offer. The incorporation of Chapter 59.18, RCW, *e.g.*, RCW 59.18.290(3), allowing for attorney fees, was a part of the unilateral contract.

The trial did not abuse its discretion in awarding double damages and attorney fees and costs to Landes.

5. ATTORNEY FEES ON APPEAL

Pursuant to RAP 18.1, this Court may award costs and attorney fees if applicable law grants a party the right to recover. Under RCW 59.18.290(3) and RCW 59.18.410(1), a party may recover attorney fees and costs. *Tedford v. Guy*, 13 Wn. App. 2d 1, 17, 462 P.3d 869, 878 (2020).

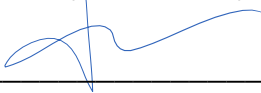
Here, Landes was awarded attorney fees and costs by the trial court under RCW 59.18.290(3) and under the terms of the unilateral contract with incorporated by reference such provision. (CP 88; *See* Section 4.7). Fees for Landes on appeal are equally recoverable and justified. Cuzdey, an ex-law, spitefully refused to vacate Landes's real property after his wife left him. He dragged out this litigation out for years simply for the sake of doing so because he knew it caused pain to, and tormented, his ex-mother-in-law. He had no hope of ever prevailing in any meaningful way, only dragging out Landes's

pain of having someone she is terrified of living on her property. His goal of somehow taking Landes's property from her could never, and will never happen, and he knew that years ago. Instead of just moving on with his life and vacating her property after being given every opportunity to, he has caused the waste of thousands upon thousands of dollars and taken enjoyment in an elderly woman's pain and fear of him. This case went to trial and before a jury as he wanted. The jury handily decided against him. Landes, an elderly widow on a fixed income, should not have to spend the last of her savings during the last of her years paying attorney fees for this utterly unnecessary and vexatious litigation.

6. CONCLUSION

For the reasons stated above, Landes respectfully requests this Court affirm the trial court and award her attorney fees and costs on appeal.

Respectfully submitted this 23rd day of January, 2023.

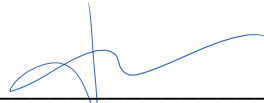


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